EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

IN THE DISTRICT COURT
AT NORTH SHORE

CRI-2015-044-001414
[2016] NZDC 10308

THE QUEEN

v

MACE MILLAR

Hearing: 8 June 2016

Appearances: E Walker for the Crown
G Anderson for the Defendant

Judgment: 8 June 2016

NOTES OF JUDGE J C DOWN ON SENTENCING

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[1] Mace Millar faced six allegations of sexual conduct with females. Two of those were effectively adults. They were older teenagers and the rest were children. He elected a Judge-alone trial which commenced on 7 March of this year and effectively concluded on 16 March, I having heard some five days of evidence. Subsequently on 21 March I delivered a prepared oral judgment where I concluded that the Crown had proved its case on all six charges beyond reasonable doubt. I therefore convicted Mr Millar and gave him a first strike warning under the Sentencing Act 2002.

[2] Today I have heard directly from two of the complainants, the first two complainants actually on the indictment; Alecia May, who was the victim of the rape back in the 1970s, and Judy Eaton, also known as Judy Walton, [details deleted] who was also subject to similar offending, although it stopped short of penetration, and was therefore amended from rape to indecent assault.

[3] I have also read victim impact statements from other victims and from family members, in particular in relation to the younger victims. Of course, the views of the victims are important. I note that none of them have sought to persuade the Court in any particular direction as to sentencing. They have been restrained in the things that they have said and focused entirely upon the impact that these offences have had upon their lives, quite properly.

[4] I would like at this sentence hearing to summarise the evidence that I found proven. Mr Millar faced six charges of indecency; three of those were of a historic type and three more recent. The offending can be grouped into two categories; firstly, against young adult women charges 1 and 2; and secondly, young girls aged around five or six, charges 3 through to 6.

[5] All of the offending occurred in the context of a broad family situation. [Relationship details deleted]. The first three allegations are historical and occurred in the 1970s. The last three are recent and occurred in 2013 and 2014.

[6] To summarise, on charge 1 the complainant, Alecia May (a charge of rape) the evidence was that [details deleted]. She was invited to go for a drive with him in his car. He drove her to a dirt road by the airport where the car stopped. She could see planes coming in and out from where she was seated in the passenger seat. The prisoner started to get closer to her. She says that she backed up to the glass on the passenger side when he moved towards her. She then remembers him pushing towards her and pain; a burning hot pain. She remembers seeing the prisoner's penis and that it was very scary. The burning pain was from down in her vagina and she knew that that was where the prisoner's penis was going and it seemed to be very, very hard and painful. She pushed the prisoner with her knees and he was saying something about [details deleted]. She said that he did not penetrate her all of the way, just the top part of his penis went into her vagina. She knew that the prisoner had not had full sex with her but that he got partly in because of the pain.

[7] Judy Eaton, or Walton, in charge 2 (originally an allegation of rape) said that she was about 17 years of age when [details deleted]. She said the prisoner took her in his car to Burwood Forest where he stopped the car. She said that he was very

close to her because she could smell his stinky breath. She says that he was on top of her and she remembers trying to push him away and fighting him. She remembered his penis touching the lower part of her body from the waist down. She said that she did not remember the defendant inserting his penis in her vagina. She said that he was on top of her and he was moving in a pulsating fashion.

[8] Charge 3; the complainant Alannah Saunders, told me that when she was five or six she was attending [name of school deleted]. [Details deleted] he was lying there naked and he grabbed her hand and made her touch his penis. She said that it did not feel very nice. There was also some evidence from her mother which corroborated what she had said because she immediately went and complained to her mum.

[9] Turning now to the more recent allegations, charge 4 is in relation to Gabrielle Simpson. [Relationship details deleted]. Gabrielle Simpson was around five at the time when this allegation arose. She said that when she was having a sleepover with [details deleted] the prisoner, she got to sleep in his bedroom. She said it was the prisoner's idea to go to sleep in his bedroom and she said that the prisoner got her to touch his "boy bit." She did not want to touch it. He put his hand on her hand and then pushed her hand down to touch it.

[10] Charge 5 is in relation to [details deleted] Gretta Lockwood, who was six at the time and is now eight. Gretta said that the prisoner pulled his pants down on one occasion and showed her "his thing." She said this happened [details deleted] when she was about six and she drew a diagram indicating where the "thing" or what she described as "his willy" was.

[11] Charge 6, finally, also was in relation to Gretta Lockwood and is the more serious of the two charges in relation to her. Gretta said that she was at the prisoner's house on one occasion when she was asleep and she either was woken up or she found that she could not sleep properly because the prisoner was licking what she described as her "front bum." She said that the prisoner did this two times, licking with his tongue and that she at one point said, "Can you stop it right now?" and he stopped but then he had another tiny lick.

[12] I have been assisted in this case very much by written submissions from both the Crown and from Mr Millar's counsel, Mr Anderson. Ms Walker has also addressed me at some length today; that was important because many of the family of the prisoner and family of the complainants are here present in Court today and need to hear what the relative positions are and the reasons why the Court comes to the decisions that I do today.

[13] The Crown urge that the appropriate overall start point in totality is somewhere between six and seven years. They emphasise towards the top end, in other words seven years. They concede that there would be no uplift to that start point for any previous convictions. There are some convictions, one of them of some relevance but extremely old and at a time when the prisoner was a youth. It is important to pause at this point to recognise and take account of the fact that the prisoner's childhood and background is troubled; that he was often in care and that he himself was abused sexually. That does not excuse, of course, what I found that he did but does at least give some relevant background and perhaps helps the Court to understand the disordered thinking that precipitated this offending.

[14] The Crown point out that because Mr Millar pursued a trial, the complainants had to give evidence and that there is therefore no mitigating discount for guilty pleas. Of course, that is true but I make the point that neither is there any aggravating uplift to the sentence for that fact. Therefore, the Crown submit the final sentence should be in the region of around seven years.

[15] The purposes of sentencing are said by the Crown to be to hold the offender accountable for the harm done by his offending, to denounce his conduct and protect the community and I accept that those purposes are appropriate in this case. The principles of sentencing that they point to are also relevant including the gravity of the offending, the seriousness of the type of offending and, in particular, the effect that this had upon the victims.

[16] The Crown urge me to approach the two lead offences, one historic and one recent, as cumulative sentences and I think that is the appropriate way forward. It is therefore necessary when carrying out the calculation of the appropriate

sentence to take into account the effect of accumulating sentences on the final total sentence.

[17] The Crown in this case has adopted a very significant discount for totality and I differ from the position that they have taken. In my view, although a significant discount is required to reflect the totality of this sentence, it should not be as great as that advocated by the Crown.

[18] I have considered the cases I have been referred to by the Crown. In particular, I make a point that I must sentence Mr Millar on counts 1 and 2 based on sentencing practice at the time of the offending; in other words, in the 1970s. I note that at this moment in time the appropriate start point for a contested rape is eight years' imprisonment. At the time of this offending, however, it was much closer to five years' imprisonment. I must bear that in mind, and I do.

[19] In summary, therefore, the Crown suggest that the appropriate starting point on count 1, rape, is around five years' imprisonment with an uplift of perhaps up to two years for the indecent assault in count 2 and the indecent act on a child in count 3. Those are all of the historic offences. That would lead to an overall start point for the historic offending of around seven years' imprisonment.

[20] Then focusing upon the recent or current offending, the most serious charge is charge 6, sexual violation by unlawful sexual connection; the licking by the prisoner of the complainant's genitalia.

[21] To assist in establishing the appropriate sentencing level I have been referred to the case of *R v AM* (CA27/2009) [2010] NZCA 114, [2010] 2 NZLR 750 which is a guideline case. I am satisfied that the appropriate start point for this offending is somewhere at the crossover between band 1 and 2. It could be as much as three and a half to four years but I have settled on three years as the appropriate start point on charge 6.

[22] The sexual conduct in charges 4 and 5, two separate victims, requires an uplift of two years, making the total start point for the recent offences of five years.

[23] I pause at this moment to note that Mr Anderson, for the prisoner, has not sought to differ from the Crown prosecutor's judgment that the overall start point should be in the region of six to seven years. I made it clear to him as he was advancing a plea in mitigation that I felt that was an overly generous allowance for totality, but that I was with him on the principle of the severity of the effect of a sentence of imprisonment on the prisoner in his current state of health. I will come to that in a moment.

[24] I have been assisted by two particular reports in this case; a s 38 report dated 24 March 2016 completed by Dr Karayiannis, a consultant psychiatrist. He concludes that the head injury suffered by the prisoner, which was somewhat apparent at the time of the trial (and certainly counsel had noted a deterioration between when he first started representing Mr Millar and at the time of the trial), together with some underlying issues, had contributed to a significant deterioration in his mental health and a diagnosis that Mr Millar is now suffering from severe dementia. Mr Anderson tells me that his dealings with Mr Millar today, pre-sentence, have satisfied him that there has been such a significant deterioration in his mental health as is reflected in that finding. He tells me of the nature of some of the conversations and that reinforces the unavoidable conclusion that his mental health has deteriorated very significantly and his dementia has advanced greatly over the last few months.

[25] I am also assisted by a pre-sentence report. There are some helpful matters considered in that report but overall, of course, the overwhelming conclusion that can be drawn from that report is the reality that Mr Millar does not accept his guilt, does not accept the verdicts, and is therefore unremorseful.

[26] I believe that the appropriate start point for charge 1, rape, it being historic and by reference to historic cases, is five years. I believe that should be uplifted by two years to reflect the indecent assault in count 2 and indecent act in charge 3, leaving me with an overall start point for the historic charges of seven years' imprisonment. I make the point that if the indecent act or the indecent assault charge had been dealt with on their own in isolation they would have justified higher sentences than is reflected in the two year uplift.

[27] As far as the recent charges are concerned, on charge 6 it seems to me on the authorities, in particular *R v AM* that the appropriate start point is three years' imprisonment and for the sexual conduct in charges 4 and 5 an uplift of two years' imprisonment. Again, in reaching that uplift figure I have had regard to the principle of totality. That results in a final start point for the recent offending of five years' imprisonment.

[28] If I were to simply add those two figures together it would result in a sentence of 12 years' imprisonment. That would be a very significant sentence, a crushing sentence particularly for a man of 68 years of age, and would in my view offend against the principle of totality. It is my view that the appropriate reduction from 12 years is three years, reducing the overall start point to nine years' imprisonment.

[29] Then I must consider whether there are any aggravating or mitigating features. I accept that there are no aggravating features relating to the defendant. Although he has some previous convictions they are not highly relevant and they are very old.

[30] He is not entitled to any discount for guilty pleas or for remorse but I am urged by Mr Anderson to conclude that a sentence of nine years' imprisonment, for a man suffering from severe dementia, would be disproportionately severe. I am satisfied that that submission is well-founded and I am therefore going to give a significant discount to take that into account. I apportion a discount of two years, which results in a final sentence of seven years' imprisonment. I note that does not, in fact, differ from the position taken by the Crown, but I have reached that figure by a different route, which does justice to the complainants in this case and also takes proper account of the real difficulties that Mr Millar now faces with his health.

[31] Stand up Mr Millar please. I do not know how much of what I have said makes a great deal of sense to you. You have been very patient and respectful in sitting listening to me and I am grateful for that. This has been a very difficult case, not only for you but also, and more particularly, for the victims. I hope that this will close the door on a very harrowing experience for some of them and for you. I am

very much aware that such offending in families causes a significant amount of harm, not only to individual victims who often suffer the consequences for many years and often for the rest of their lives, but also for the family generally, because divisions occur as a result of such allegations and those divisions, and the resultant damage that occurs to family relations, are very hard to heal.

[32] On charge number 1, a charge of rape relating to Alecia May, you are sentenced to imprisonment for four years.

[33] On charge number 2, a charge of indecent assault relating to Judy Eaton, you are sentenced to imprisonment for two years. That is concurrent.

[34] Charge 3, indecent act upon Alannah Saunders, you are sentenced to imprisonment for two years. That is concurrent.

[35] On charge 4, indecent conduct with Gabrielle Simpson, you are sentenced to imprisonment for two years. Again, that is concurrent.

[36] On charge 5, for sexual conduct with Gretta Lockwood, you are convicted and sentenced to imprisonment for one year. That is concurrent.

[37] Finally, charge 6, in relation to Gretta Lockwood, the other lead charge, sexual violation by unlawful sexual connection, you are sentenced to imprisonment for three years. That is cumulative upon charge number 1, making a total of seven years' imprisonment.

J C Down
District Court Judge